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No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ, *et al.*,
Petitioners,

v.

DARLENE JENKINS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE COMMERCIAL LAW LEAGUE OF AMERICA, *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether attorneys engaged solely in the prosecution of litigation against consumers are regulated by the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692 - 1692o, Pub.L. 90-321, Title VIII, §§ 802 - 817).

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Pursuant to Rule 37 of the Rules of this Court, the Commercial Law League of America respectfully submits this brief as *Amicus Curiae*, in support of the Petitioners. Petitioners and Respondent have both consented to the filing of this brief, and true copies of such are filed herewith.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 25 F.3d 536. The opinion of the district court is not reported.

INTEREST OF THE *AMICUS CURIAE*

The Commercial Law League of America (CLLA) is a 100-year-old national organization of attorneys, commercial collection agencies, and other experts in credit and finance actively engaged in the fields of commercial law and bankruptcy and reorganization. The CLLA is the publisher of the award-winning *Commercial Law Journal* and *Commercial Law Bulletin*. It has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable, and efficient administration of commercial and bankruptcy cases for all parties-in-interest. The League has been firmly committed to policing its own industry and has regularly provided articles and presentations to its members on the manner in which attorneys, collection agents, and creditors need to conduct themselves when engaging in debt collection activities.

Through its representatives, the CLLA has testified before Congress on numerous occasions, and the League has provided expert testimony in the fields of collections and bankruptcy and reorganization. In 1992, the League provided testimony at the oversight hearings on the Fair Debt Collection Practices Act. A substantial number of the attorneys and agencies in the League collect consumer debts, and the FDCPA has a significant impact on those members and their clients.

STATEMENT

Respondent Darlene Jenkins borrowed money from Gainer Bank to purchase a car. The installment contract between Respondent and the bank required that she keep insurance on the car until she made her last payment. If she did not keep insurance, the installment contract allowed the bank to purchase insurance for the car and

then to charge Jenkins for the cost of the insurance. Specifically, the installment contract provided:

> if the Buyer does not pay the taxes on the collateral [or] keep it insured against loss or damage, . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect.

Respondent defaulted on her loan. She also stopped buying insurance for the car. The bank then purchased insurance and hired an attorney (Petitioner George W. Heintz) and his law firm (Petitioner Bowman, Heintz, Boscia & McPhee) to recover the remaining installment payments and the cost of the insurance. Petitioners sued Respondent on behalf of the bank, demanding both the installment payments and a $4,173.00 insurance charge, and then attempted to settle the matter out of court.

Respondent took issue with the $4,173.00 insurance demand. She believed that the bank did not buy simple damage and loss insurance for the car but instead purchased a financial protection policy to insure against the possibility that she might default on the loan. Her position was that she was only required to reimburse the bank if it purchased damage and loss insurance for the car and that she had no obligation to reimburse the bank for the protection policy.

Respondent filed suit against Petitioners, alleging that their attempts to pass the unauthorized insurance costs on to her violated the Fair Debt Collection Practices Act. Her legal theory was two-fold. First, she claimed that the insurance charge was not authorized by the installment contract, and therefore alleged that Petitioners violated 15 U.S.C. § 1692f of the Act by adding an unauthorized amount onto

the debt. Second, she claimed that Petitioners' attempt to include the insurance charge on her bill amounted to a "false representation or deceptive means to collect any debt" in violation of 15 U.S.C. § 1692e.

Petitioners moved to dismiss under Fed. R. Civ. P. 12(b)(6), asserting that Congress simply could not have intended to regulate normal legal proceedings under the auspices of the Act. The District Court agreed and dismissed the case. Respondent appealed to the United States Court of Appeals for the Seventh Circuit, which held that Congress' deletion of the attorney exemption renders attorneys subject to the restrictions of the FDCPA even when they are engaged in purely legal activities.

SUMMARY OF ARGUMENT

Amicus Curiae contends that the wholesale application of the Fair Debt Collection Practices Act to all activities of collection attorneys, including those activities that are purely legal in nature, prevents attorneys from effectively practicing law and aggressively representing their clients. These effects were neither envisioned nor intended by Congress in deleting the attorney exemption from the Act in 1986, and they go far beyond the legislative goal of protecting consumers from abusive debt collection practices.

The Court of Appeals' holding that purely litigation activities are regulated by the FDCPA results in the Congressional regulation of state court pleadings and procedures. Furthermore, such regulation could prevent creditors from ever having their day in court and could impose upon their attorneys strict liability every time a creditor fails to prevail on each and every theory of liability and element of damages sought in a suit.

ARGUMENT

Introduction

The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 - 1692o, Pub.L. 90-321, Title VIII, §§ 802 - 817 ("FDCPA" or "the Act"), was enacted in 1977, "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Although 15 U.S.C. § 1692a(6)(F) originally exempted attorneys engaged in debt collection from regulation under the Act, that exemption was deleted in 1986 in order to eliminate the ability of attorneys to engage in those sorts of activities prohibited for other debt collectors and to prevent attorneys from competing unfairly with non-lawyer collectors. *See* H.R. Rep. No. 405, 99th Cong., 2d Sess. 3-7, reprinted in 1986 U.S.C.C.A.N. 1752, 1754-57; *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993).

Despite the evil that Congress intended to address, the reported case law indicates that attorneys are being subjected to liability *not* for the sort of abusive practices that the Act was intended to regulate, (*see* S. Rep. No. 382, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696), but rather for technical violations of the Act that have caused little or no injury to the consumer. *See, e.g. Carroll v. Wolpoff & Abramson*, 961 F.2d 459 (4th Cir. 1992), cert. denied, __ U.S. __, 113 S.Ct. 298, 121 L.Ed.2d 222 (1992); *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991). At least one appellate judge has suggested that in some instances, the Act has become a mere profit-generating mechanism for attorneys who appear to be more interested in making fees than in stopping abusive collection practices

or helping consumers. *See Frey v. Gangwish*, *supra*, at 1521-1522, (Suhrheinrich, J., dissenting). The CLLA acknowledges that these cases have involved violations of the technical language of the Act, but they certainly do not evidence the sort of abuse or harassment of consumers that the FDCPA was designed to address.

The legislative history of the FDCPA indicates that by deleting the attorney exemption, Congress was attempting to level the playing field and subject attorneys to the same sort of restrictions and burdens that were already imposed upon collection agencies. *See* S. Rep. No. 382, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696. Instead, as will be addressed below, the holding of the Court below serves to go far beyond removing a competitive disadvantage as it impairs the ability of attorneys to conduct any business at all.

Special Judicially-Created Rules

The earlier case law that has developed under the FDCPA has resulted in the evolution of a number of "rules" of application of the Act. The holding of the Court of Appeals' in the instant case should be examined in light of some of these earlier "rules" in order to fully appreciate its implications. These general doctrines are:

a. The FDCPA is a strict liability statute and the degree of culpability of a "debt collector" is relevant only on the issue of damages. *Clomon v. Jackson*, 988 F.2d 1314, 1320 (2d Cir. 1993); *Bentley v. Great Lakes Collection Bureau, Inc.*, 6 F.3d 60, 63 (2d Cir. 1993).

b. In testing for a violation of the FDCPA, the question is whether the conduct of a debt collector would tend to deceive the "least sophisticated consumer." *Clomon v. Jackson*, *supra*, at 1318; *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985); *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025 (6th Cir. 1992).

c. Upon proof of a violation of the Act, a prevailing consumer will be entitled to an award of attorney's fees, even if (s)he fails to prove any damages. *Emmanuel v. American Credit Exchange*, 870 F.2d 805, 809 (2d Cir. 1989); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989); *Graziano v. Harrison*, *supra*, at 113-114.

d. In awarding fees to a prevailing consumer, a trier of fact may make such award at prevailing market rates, even if the attorneys are not themselves paid at market rates. *Hollis v. Roberts*, 984 F.2d 1159 (11th Cir. 1993); *Cf. Harper v. Better Business Services, Inc.*, 961 F.2d 1561 (11th Cir. 1992). Thus, legal assistance organizations who have access to vast pools of potential clients have the ability to bully attorneys into settlements by the threat of market rate fees in cases which will otherwise result in no damage awards.

There are additional special doctrines under the Act which will be addressed below as they apply to the instant case. In this case, the Court of Appeals has held that Petitioners' conduct in filing pleadings is a type of collection activity regulated by the FDCPA. The remainder of this brief will address the effect of subjecting purely litigation activities to regulation under the Act.

Lawyers As "Debt Collectors"

In the Fair Debt context, the term "debt" means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5). To qualify as a "debt collector," an attorney must be a "person who uses any instrumentality of interstate commerce or the mails in any busi-

ness the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Even those attorneys who only occasionally collect debts for others may be regulated by the Act since debt collection may be a "regular" part of one's practice, even if not a substantial part. Thus, collection activities amounting to only a small fraction of a firm's total activity may be enough to qualify the firm as a "debt collector." *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F.Supp. 319 (E.D.Mi. 1992).

In *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992), the Court of Appeals held that the FDCPA applied to attorneys who were engaged in purely legal activities, reasoning that the performance of exclusively legal tasks can be the sort of "indirect" debt collection subject to the Act. Although *Scott* only involved violations of 11 U.S.C. § 1692i (the venue provision of the Act), the Fourth Circuit did not expressly limit its holding to violations of that one section and left open the question of whether the Act regulated all litigation activities. That gap has been filled with a split in Circuit authorities. The Sixth Circuit held in *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993), that "the actions of an attorney while conducting litigation are not covered by the FDCPA" but the Ninth Circuit in *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994) and the Seventh Circuit in the present case held that such activities are covered by the Act.

The CLLA does not contend that the result in *Scott v. Jones* was erroneous, since 15 U.S.C. § 1692i evidenced a clear intent by Congress to protect consumers from the abuse occasioned by the filing of debt collection suits in distant forums. In few other sections of the Act, however, did Congress address litigation-related activities, and in

those instances where it did so, it concerned itself with unauthorized practices of law, falsification of official court documents, and misrepresentations concerning legal process. 15 U.S.C. §§ 1692e(3), (9), (13), and (15). The specific prohibitions in these areas were enacted prior to the 1986 amendment, and they appear merely to provide restrictions upon non-lawyers that already would exist under attorney disciplinary rules and/or Fed. R. Civ. P. 11. Because *Fox v. Citicorp Credit Services, Inc.* involved venue violations of 15 U.S.C. § 1692i, the CLLA asserts that it is distinguishable from the case at bar and does not provide good authority in support of Respondent's position.

If this Court chooses to extend the regulation of the FDCPA to all legal activities and not just those specifically described in the Act, then the Court will be effectively ruling that attorneys are to be held strictly liable for violations allegedly committed in the course of prosecuting suits. *See Bentley v. Great Lakes Collection Bureau* at 63. This may not be an inherently evil result in the area of venue violations such as those in *Scott v. Jones* and *Fox v. Citicorp Credit Services, Inc.* The fact situations in the present case and in *Green v. Hocking*, however, demonstrate why an absolute application of the Act to legal activities should offend traditional notions of due process because of the chilling effect upon the practice of law and on the ability of creditors to secure their day in court. In fact, as discussed below and in the Court of Appeals' opinion in *Green v. Hocking*, a literal reading of the Act would indicate that such application could prevent a creditor from ever having its day in court.

In *Green v. Hocking*, the attorney (Hocking) did not contact the debtor before filing suit and engaged in none of the traditional non-litigation collection activities such as telephoning the debtor or sending dunning letters. The

original collection suit that Hocking filed alleged that Green owed his client a total of $304.83, which included interest at an erroneous rate. Hocking subsequently filed an amended complaint, stating that Green owed $239.56 (calculated at the correct interest rate) after Green called to his attention the interest rate error. After the parties settled the underlying collection dispute, Green sued Hocking in federal court, alleging that he had violated 15 U.S.C. § 1692e(2)(A)[1] by the falsely representing the amount of a debt, and 15 U.S.C. § 1692f(1)[2] by attempting to collect an amount, including interest, that was not "expressly authorized by the agreement creating the debt or permitted by law." The District Court dismissed the case, ruling that Hocking was immune from liability under the FDCPA because he confined his activities to those of a legal nature. The Sixth Circuit upheld that finding, holding that "the actions of an attorney while conducting litigation are not covered by the FDCPA." *Id.* at 22.

The Seventh Circuit reached an opposite result in the instant case, holding that regardless of the wisdom of its actions, Congress regulated even litigation-related debt collection activities when it deleted the attorney exemption.

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[1] 15 U.S.C. § 1692e prohibits a "debt collector" from using any false, deceptive, or misleading representation or means in connection with the collection of any debt. 15 U.S.C. § 1692e(2)(A) includes under the heading of "false, deceptive, or misleading," falsely representing the character, amount, or legal status of any debt.

[2] 15 U.S.C. § 1692f prohibits a debt collector from using unfair or unconscionable means to collect or attempt to collect any debt. Pursuant to 15 U.S.C. § 1692f(1) the term "unfair practices" includes the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

Jenkins v. Heintz, 25 F.3d 536, 539 (7th Cir. 1994), *cert. granted*, ___ U.S. ___, 63 U.S.L.W. 3161 (October 31, 1994). The Second Circuit, while it has not yet ruled on the issue, has at least indicated in dicta that it would probably be in accord with the Seventh and Ninth Circuits. *See Paulemon v. Tobin*, 30 F.3d 307, 310 (2d Cir. 1994). The Sixth Circuit noted in *Green v. Hocking* that this "result would produce absurd outcomes," and most of the remainder of this brief will concentrate on examples of some of the outrageous situations that could easily result from the Seventh Circuit's ruling in the instant case.

Validation Of Debts

Within five (5) days of a debt collector's initial communication with the consumer in connection with the collection of any debt, (s)he must send the consumer the validation of debt notice required by 15 U.S.C. § 1692g. Some attorneys (such as Mr. Hocking) have attempted to avoid this requirement by limiting their activities to exclusively legal tasks. They make it their practice to file suit without ever making written or oral demand on the debtor, thus avoiding engaging in the sort of "traditional" debt collection activities that the FDCPA was originally intended to regulate. Once a judgment has been obtained, however, it may be unavoidable for an attorney to correspond with the judgment debtor if the judgment is to be enforced.

In *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992), the "debt collector" was an attorney who had filed suit and ultimately negotiated an agreed judgment and payout with the consumer. More than a year later, the consumer defaulted on the payment plan and the attorney wrote to her in connection with the judgment debt. The consumer filed suit against Mr. Gangwish asserting, *inter alia*, that he had violated the FDCPA by failing to give to her the validation

of debt notice in his post-judgment communications. The Court of Appeals reversed a summary judgment in favor of the attorney, finding that because he had never communicated directly with the debtor prior to judgment, he was required to give the notice after he wrote directly to Ms. Frey. Thus, although the consumer had actually appeared in the suit and had agreed to a judgment, the attorney was still subjected to liability for failing to furnish her with information that she already possessed as a result of the suit, informing her of the right to dispute a debt consisting of the very judgment to which she had agreed.

The question of whether all litigation activities are "debt collection" was not before the court in *Frey v. Gangwish*. If that is the ruling of the Supreme Court in this case, then it is possible that in cases where there has been no prior communication, the validation notice will have to be given within five days of service of the suit upon the debtor. Granted, one may argue that: (a) the complaint is directed to the court and not the debtor;[3] and (b) the citation is a communication from the court and not the attorney. Neither of those excuses is particularly satisfactory with regard to discovery, however, since discovery is ordinarily directed from the attorney to the debtor. The application of the Act to litigation activities could trigger a duty to send the validation notice (if not previously given) within five days of the service of discovery and possibly within five days of service of the complaint in jurisdictions that permit service of discovery with the initial complaint. (*See, e.g.*,

[3] In *George A. Fuller Co. v. Carpet Services, Inc.*, 823 S.W.2d 603 (Tex. 1992), the issue before the Court was whether the filing of a suit alleging an excessive amount of interest was a "charging" of interest for the purpose of the Texas usury statute. The Court held that it was not, based in part upon the conclusion that pleadings are directed to the trial court rather than to the opposing party. *Id.* at 605.

Tex. R. Civ. P. 167 and 168.) The establishment of such a rule of law would undermine the very purpose of the Act as it only serves to confuse and mislead the consumer who is told by the attorney that (s)he has thirty days to validate the debt but is instructed by the Court to answer the suit in a shorter time.

Overshadowing the Thirty Day Notice

The problems with the validation notice and litigation activities go far beyond the question of when it must be sent. In *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222 (9th Cir. 1988), the Ninth Circuit held that the validation notice must not be overshadowed or contradicted by other messages or notices appearing in the initial communication, and that any attempt to require the debtor to act immediately and not take the full thirty days to request verification is a violation of § 1692g. *Id.* at 1225 - 1226. Similar results were reached by the Third Circuit in *Graziano v. Harrison, supra*, and the Fourth Circuit in *Miller v. Payco - General American Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991).

A review of the FDCPA indicates that nowhere does the Act generally prohibit a debt collector from taking action to collect the debt during the thirty-day validation period. If Congress had wanted to include such a prohibition it certainly could have done so, as it did for the specific situations in which a debt collector must cease collection activities because the consumer has made a written request for verification of the debt or a written demand to cease communications. *See* 15 U.S.C. §§ 1692g(b) and 1692c(c). In *Graziano v. Harrison*, the attorney (Harrison) sent a letter containing the validation notice, but that letter also threatened legal action if the debt was not paid within ten days. Relying upon *Swanson*, the Third Circuit held that in

making that threat Harrison had violated the FDCPA because the "least sophisticated debtor" might have been induced to overlook the right to dispute the debt within thirty days. Thus, as things currently stand, it appears that it is not a violation of the Act to file suit during the validation period, *but it is a violation to truthfully inform the consumer that the creditor may take such action.*

If any and all litigation activities are "debt collection" then the combination of such a rule with the *Swanson* doctrine presents a significant disruption in the practice of debt collection litigation. If service of the citation and complaint (or a transmittal letter in connection therewith) is a "communication," then a citation's requirement to answer within a period of less than thirty days may arguably violate the holdings in *Swanson, Graziano, and Miller.*

Even if attorneys can escape the problem with regard to pleadings, one must come back to the question of discovery. In the common situation in which: (a) the attorney has never written nor spoken to the debtor; (b) suit has been filed and the defendant has answered *pro se*; and (c) a deposition notice is served, directed from the attorney to the debtor, requiring the debtor to appear in ten days to give a deposition, a problem may arise under the Act. If the attorney does not give the validation notice at this point (s)he may be in violation of the FDCPA, and if the validation notice is given then the deposition notice may overshadow and contradict the thirty-day period so as to constitute a violation. Even if the deposition is scheduled for after the expiration of the thirty-day period, the effect of a *subpoena duces tecum* may be that by forcing the consumer to begin collecting documents, it coerces the debtor to take less than thirty days to dispute the debt, and that is the result prohibited by *Swanson*, *Graziano*, and *Miller*, *supra*.

Demanding Verification

In addition to the problem of when to send the validation notice and the "overshadowing" issue, the validation of debt section of the Act presents an additional complication when applied to litigation. If the consumer notifies the attorney in writing within the thirty day period described in 15 U.S.C. § 1692g(a) that the debt or any portion thereof is disputed or that the consumer requests the name and address of the original creditor, the attorney will be **prohibited** from attempting to collect the debt or any disputed portion thereof, until (s)he obtains verification of the debt or a copy of the judgment or the name and address of the original creditor and a copy of such information is mailed to the consumer. 15 U.S.C. § 1692g(b). If this provision of the Act is applied to litigation activities, the FDCPA gives a debtor the ability to temporarily shut down the litigation and discovery processes, as the creditor's attorney can be prevented from continuing to litigate until verification has been sent. Moreover, if the filing of an answer in a suit is construed to be written notice to the attorney that the debt is disputed, the debtor's mere failure to default may trigger the attorney's obligations and restrictions under 15 U.S.C. § 1692g(b) in every contested case. Because of the strict liability holding in *Clomon* and *Bentley*, *supra*, and the mandatory fee award holdings noted above, this presents significant exposure to the creditors' bar in the United States.

The "Miranda Warning"

Except for communications made to acquire location information under § 1692b, the debt collector must disclose clearly in all communications made to collect a debt or to obtain information about a consumer "that the debt collector is attempting to collect a debt and that any information

obtained will be used for that purpose." 15 U.S.C. § 1692e(11). The failure to make such disclosure is a "false, deceptive, or misleading representation or means" in connection with the collection of a debt. *Id.* Unlike other portions of the Act that deal with actual abuse of consumers, this section has been applied against attorneys who neither abused nor harassed debtors, producing results which are illogical and do nothing to further the purposes of the Act. In *Frey v. Gangwish, supra*, and *Carroll v. Wolpoff & Abramson, supra*, attorneys were held liable for failing to notify debtors in *post-judgment* communications that they were attempting to collect debts and that the information obtained would be used for that purpose. How could the consumer not know at the post-judgment stage that the attorney is attempting to collect a debt, and for what other purpose would any information be used?

If litigation activities are "debt collection," then the warning arguably has to be given in all pleadings. Even if this Court decides that pleadings are not "communications," the question remains as to whether the warning will be necessary in discovery documents, transmittal letters, hearings, depositions, etc. Those communications appear to be clearly intended for the purpose of collecting the debt and it is hard to reconcile the holding of the Court below with the arguments of those who insist that the warning need not be given in connection with litigation-related communications. While the apparently unambiguous language of the Act (*see Pipiles v. Credit Bureau of Lockport, Inc., supra* at 26-27) may necessitate a slavish adherence to the letter of the statute in post-judgment dunning letters and phone calls, applying the Act to litigation activities and permitting it to regulate the contents of pleadings is an invitation to open the floodgates of litigation for plaintiffs who have not actually suffered any damages.

Communications In General

Unless (s)he has received direct prior consent from the consumer or express permission from a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt:

a. at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer; or

b. at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication. 15 U.S.C. §§ 1692c(a)(1) and (3).

If the Act regulates attorneys' litigation activities, it may be argued that a debtor cannot be served with citation or discovery subpoenas at his/her place of employment. A debtor might even be able to prevent service of citation or subpoenas completely by notifying the attorney that all times will be inconvenient. Beyond the possibility that this section of the Act could impair a creditor's ability to diligently prosecute a suit against a debtor who is evading process, a creative debtor's attorney may be able to find a Fair Debt claim in every debt collection suit. The clearest example of this problem is in the area of medical collection suits against the ill and infirm. Their lawyers could easily argue that they will always be inconvenienced by service of court documents. Thus, attorneys who represent health care providers may be exposed to Fair Debt litigation every time they file a suit.

Acquisition Of Location Information

When communicating with any person other than the consumer for the purpose of acquiring location information about the consumer, a debt collector may not:

a. state that such consumer owes any debt, 15 U.S.C. § 1692b(2); nor

b. communicate with any person other than the consumer's attorney, at any time after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector. 15 U.S.C. § 1692b(6).

If applied to litigation activities, these sub-sections would substantially restrict an attorney's ability to communicate with process servers and skip-tracers, a result that does not appear to have been envisioned by Congress in deleting the attorney exemption. If an attorney cannot skip-trace the debtor (s)he may be unable to effect personal service. Admittedly, there may be the option of service by publication, but leaving collection attorneys with that as their only option seems to be contrary to the very purposes of the Act. Furthermore, as is discussed below, applying the Act to litigation activities presents problems for an attorney seeking to serve by publication.

Communication With Third Parties

Except as provided in 15 U.S.C. § 1692b[4], a debt collector may not communicate in connection with the collection of a debt with any person other than the consumer, the consumer's attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector, without either: (a) the prior consent of the consumer given directly to the debt collector; (b) the express permission of a court of competent

[4] The section dealing with locating the debtor.

jurisdiction; or (c) as reasonably necessary to effectuate a post-judgment judicial remedy. 15 U.S.C. § 1692c(b). Applying this section of the Act under the holding of the Court below to purely pre-trial litigation activities would mean that a creditor's attorney could not (without express prior approval from the trial court) discuss a case with fact witnesses[5] or even process servers, as such communications would be "in connection with" the collection of a debt. The most literal reading of this section would prohibit the attorney from discussing the suit with the clerk or other personnel employed by the trial court, and the Sixth Circuit has stated its belief that such is the very result of the legal position taken by Respondent. *See Green v. Hocking*, *supra*, at 21. It would also bar citation by publication without a specific court order, even if that form of service is expressly authorized under state law, as such publication would be a communication with thousands of third parties.[6] Substituted service upon other persons at the consumer's place of business or abode in situations in which the consumer is evading service of process will require orders granting express permission under this section. Thus, the Court of Appeals' holding in the instant case will also necessitate a flood of additional motions and pleadings in all consumer debt collection suits in which the debtor cannot be served personally, as attorneys will want to limit their exposure under the Act.

[5] In *Masuda v. Thomas Richards & Co.*, 759 F.Supp. 1456 (C.D.Cal. 1991), the Court found, as a matter of law, that contacting the consumer's insurance company without his consent violated § 1692c(b). In a disputed claim over medical bills, for example, such contact may be essential, especially when a creditor is asserting a medical lien and the consumer received direct payment from the insurer and spent the money.

[6] Of course, local publications such as weekly trial court reporters can publish the names of parties, facts of cases, and results of suits with impunity as they are not regulated by the FDCPA.

The result of applying Section 1692c(b) of the Act to purely legal activities is a massive chilling effect upon attorneys. How can attorneys carry out their ethical duty to represent their clients zealously within the bounds of the law if they are subject to being second-guessed and sued in connection with every service of citation or subpoena or public sale of a debtor's property under court process, over whether the public communications made in connection therewith were "reasonably necessary?" Since the bona fide error defense set out in 15 U.S.C. § 1692k(c) will not be available if the attorney commits an error of law, (*see Smith v. Transworld Systems, Inc.*, 953 F.2d 1025 (6th Cir. 1992), *Baker v. G.C. Services Corp.*, 677 F.2d 775, 779 (9th Cir. 1982)), the holdings in *Clomon*, *Bentley*, and *Emmanuel*, *supra*, expose attorneys to strict liability for guessing wrongly about the reasonable necessity of third party communications relating to pending suits or judgments.

Ceasing Communication

If a consumer[7] notifies a debt collector in writing that (s)he refuses to pay a debt or that (s)he wishes the collector to cease further communication, the debt collector is prohibited from communicating further with the consumer except:

a. to advise the consumer that the debt collector's further efforts are being terminated;

b. to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

[7] For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator. 15 U.S.C. § 1692c(d).

c. where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. 15 U.S.C. § 1692c(c).

If litigation activities are regulated by the FDCPA, then arguably a consumer could send written notice to an attorney that (s)he refuses to pay a debt, and the attorney would be prohibited from pursuing suit since that would necessarily require numerous communications with the consumer. This very concern was raised by the Sixth Circuit as a reason to not include litigation activities as debt collection. *Green v. Hocking*, *supra*, at 21. What even that court did not consider was that the application of Section 1692c(c) to purely legal activities could also enable a judgment debtor to prevent an attorney from conducting discovery in aid of judgment or otherwise enforcing a judgment. Surely that result deprives creditors of their right to due process under the Constitution. Furthermore, if creditors cannot adequately enforce debts that are due to them then consumers will ultimately be the ones to suffer as there will be a necessary tightening of credit granting practices.

False Or Misleading Representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. The terms "false, deceptive, or misleading" include:

a. the false representation of -

(1) the character, amount, or legal status of any debt; or

(2) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt;

b. the threat to take any action that cannot legally be taken or that is not intended to be taken; and

c. communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed. 15 U.S.C. §§ 1692e(2), (5), and (8).

These sections of the Act were written prior to the 1986 deletion of the attorney exemption. While they make perfect sense when applied to debt collection activities outside of litigation (such as demand letters and collection calls), they present numerous problems when applied to purely legal activities. With regard to the first two sub-sections set forth above, they leave attorneys exposed to statutory liability for any typographical errors in pleadings and for any theory of recovery on which they are not successful. For example, if an attorney's secretary makes a typographical error on the amount of a debt, the error can be corrected without injury to the consumer, since: (a) the pleading can be amended; and (b) the trial court will still presumably allow recovery only for that which is legally proven at trial. Because the FDCPA is a strict liability statute, however, (*see Clomon v. Jackson* at 1320 and *Bentley v. Great Lakes Collection Bureau* at 63), the attorney could still be exposed to statutory damages and attorney's fees for the innocent error. While the attorney could, in that instance, invoke the bona fide error defense under 15 U.S.C. § 1692k(c), (s)he would still have to incur the substantial expense of defending the Fair Debt suit and proving that defense.

In addition to exposure for technical violations, an attorney is also exposed to FDCPA liability if (s)he asserts a cause of action or theory of recovery which is not ultimately successful, as arguably that would be misrepresenting the "compensation which may be lawfully received" or a "threat to take any action that cannot legally be taken." Thus, Respondent's assertion that the Act applies to purely legal activities has the potential effect of imposing strict statu-

tory liability on attorneys if they should lose on their theories of liability. The CLLA urges the Court not to countenance such a result because of its chilling effect on the practice of law. Even if such a violation produces no actual damages because the consumer was found to be liable on an alternate theory of recovery, the award of attorney's fees for a violation of the Act is still mandatory, and the attorney could be punished for the client's inability to prove even one of its claims. *See Emmanuel v. American Credit Exchange*, *supra*, at 809; *Pipiles v. Credit Bureau of Lockport, Inc.*, *supra*, at 28; *Graziano v. Harrison*, *supra*, at 113-114.

Yet another problem presented by 15 U.S.C. § 1692e is that which arises when the consumer has previously disputed the debt. Assuming that suit can even be filed at that point,[8] an attorney's failure to disclose in the complaint that the debt is disputed may arguably create liability under 15 U.S.C. § 1692e(8). Thus, the extension of FDCPA regulation to purely legal activities results in Congressional regulation of the content of all collection suit pleadings.

Reverse Forum Abuse

While the FDCPA protects consumers from the burden of being sued in a distant and inconvenient forum, it has precisely the opposite effect for debt collectors who are sued under the Act. The Second Circuit has held that it is the place where the consumer receives the offending communication from a debt collector that governs venue in a Fair Debt suit. *Bates v. C & S Adjustors, Inc.*, 908 F.2d 865 (2d Cir. 1992). In that case, the collection letter was mailed to

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[8] As noted above, 15 U.S.C. §§ 1692c and 1692g(b) may arguably prohibit the attorney from filing suit.

the debtor at his former address in Pennsylvania, but it was forwarded by the post office to his new address in New York. Although the collector did not intend to communicate with the debtor in New York, the receipt of the notice there was controlling. The Court of Appeals suggested that the only way to avoid such exposure is to stamp the envelope "do not forward." It would therefore appear that an attorney "debt collector" who properly sues a resident of another state in full compliance with 15 U.S.C. § 1692i might be subjected to venue and jurisdiction in that foreign state if the suit pleadings received by the debtor are alleged to be violations of the Act.

Rule 11 and Its State Court Equivalents

As noted by the Court of Appeals in *Green v. Hocking*, Fed. R. Civ. P. 11 already insures that an attorney who signs any document verifies that (s)he has conducted an investigation, and that, to the best of the attorney's knowledge, the averments are accurate and grounded in fact. The decision to impose Rule 11 sanctions, however, rests with the sound discretion of the trial court. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). This discretion, integral to Rule 11 because the court knows best how to regulate its forum, is eliminated and in its place is substituted a system of strict liability mandating sanctions in the form of attorney's fees and statutory damages whenever an attorney makes the slightest error.

Affirming the Court of Appeals holding in this case will effectively shift the regulation of attorneys from the judiciary to the Congress. Also, as noted above, the application of the FDCPA to purely litigation activities means that Congress will be taking over the regulation of pleadings and practice in state court lawsuits. The CLLA believes

that these are results which should not be permitted and which are not necessary evils for the protection of consumers. These issues will not be addressed at greater length, however, as it is the CLLA's understanding that the American Bar Association will be addressing them in its *amicus curiae* brief.

Privileged Use of Civil Proceedings

Outside of Rule 11, the authors of the RESTATEMENT OF TORTS recognized certain immunities for attorneys from liability arising out of the institution of litigation and the contents of pleadings. In the area of defamation, the RESTATEMENT (SECOND) OF TORTS § 586 (1977) provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

"Comment a" to that section explains that "[t]he privilege stated in this Section is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege is absolute."

The authors of the RESTATEMENT also recognized a general doctrine in favor of providing attorneys immunity from liability for the wrongful use of civil proceedings.

> An attorney who initiates a civil proceeding on behalf of his client or one who takes any steps in the proceeding is not liable if he has probable cause for his action (see § 675); and even if he has no probable cause and is convinced that his client's claim is unfounded, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his

> claim. (See § 676). An attorney is not required or expected to prejudge his client's claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of his chances. RESTATEMENT (SECOND) OF TORTS § 674 comment d (1977).

These sections of the RESTATEMENT make sense as they enable the attorney to represent the client "zealously within the bounds of the law." *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7; MODEL RULES OF PROFESSIONAL CONDUCT Preamble. If the opinion of the Court of Appeals below is affirmed, however, this Court may be adopting a rule of law diametrically opposed to that doctrine. The attorney will become the strictly liable insurer of the success of the creditor's assertions, while the creditor itself will not face such liability. 15 U.S.C. § 1692a(6)(A). This only serves to exacerbate an inherent and unavoidable conflict between attorney and client, a result which lessens the effectiveness and integrity of the judicial process. Furthermore, as the FDCPA only applies to suits to collect debts, the Court will be singling out a segment of the nation's bar who will be subject to strict liability in the conduct of litigation when attorneys in no other area are subject to such a standard.

FDCPA Regulation of Litigation Activities Is Likely to Harm Consumers

Finally, this *Amicus Curiae* contends that the long-term effect of regulating litigation activities under the FDCPA is that consumers, the very group whom the Act was intended to protect, will suffer. For all of the reasons noted above, the affirmation of the Court below will have a substantial chilling effect on the practice of law. That effect will impact upon credit grantors who will find it more difficult and more expensive to hire attorneys to sue on consumer debts.

If collecting such debts becomes more difficult (if not impossible), those credit grantors will necessarily require greater security in order to extend credit, and they will have to charge higher interest rates to compensate for the increased costs. These burdens will be borne by the consumers.

CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the trial court's dismissal of Respondent's suit and held that the FDCPA regulates attorneys when they are engaged in purely legal activities should be reversed.

Respectfully submitted,

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